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SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED
JUN 17 1948
CHARLES ELMORE CROPLEY
CLERK

OCTOBER TERM, 1948

No. 89

THE UNITED STATES OF AMERICA,
Appellant,

vs.

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA.

STATEMENT OF SAFEWAY STORES, INCORPORATED, OPPOSING JURISDICTION

ELISHA HANSON,
ARTHUR B. HANSON,
LETITIA ARMISTEAD,
Counsel for Appellee.

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

OCTOBER TERM, 1948

CRIMINAL ACTION

No. 294-48

UNITED STATES OF AMERICA

vs.

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC., ET AL.

STATEMENT OF APPELLEE, SAFEWAY STORES, INCORPORATED, OPPOSING JURISDICTION

Comes now Safeway Stores, Incorporated, a defendant in the above-entitled case, by its attorneys, and pursuant to Rule 12, paragraph 3, Rules of the Supreme Court of the United States, discloses the following matter making against the jurisdiction of said Court, as asserted in a statement of the basis of appellate jurisdiction filed by appellant on May 11, 1948.

The United States is appealing under the Criminal Appeals Act (18 U. S. C. A. 682) from an order of the District Court of the United States for the District of Columbia dismissing an indictment returned on March 8, 1948, founded on Section 3 of the Sherman Anti-Trust Act (15 U. S. C. A. 3).

Statement of the Case

Appellee, Safeway Stores, Incorporated, disagrees with the statement by the United States of the issues and the ruling below and herewith offers its own brief statement of the case.

A one count indictment numbering twelve pages was returned on March 8, 1948. Safeway Stores, Incorporated, was one of the nine defendants named therein.

Two of the defendants named in the indictment filed motions to dismiss.

Simpson Brothers, Inc., filed a motion to dismiss on two grounds, namely that the indictment was duplicitous, and, second, that the indictment did not state facts sufficient to constitute an offense against the United States.

Defendant B. B. Derrick filed a motion to dismiss the indictment on the ground that it was bad in substance in that it charged acts by an agricultural cooperative which were immune from prosecution under the anti-trust laws by reason of subsequent legislation and for such other reasons as were apparent on the face of the indictment.

The trial judge held that the indictment was not duplicitous but granted the motions to dismiss on the ground that sufficient facts had not been pleaded to constitute an offense against the United States.

The trial judge on his own motion then dismissed the indictment as to all remaining defendants. The opinion of the lower court was rendered on April 27, 1948, and is yet not officially reported. It is therefore set out in its entirety as it appears at pages 333 and 334 of the Official Transcript of Proceedings designated as a part of the record herein:

> "Opinion of the Court.
>
> "The Court: The motion to dismiss is in two parts; one, that it is duplicitous and the other that the indictment is bad in substance.

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"The Court holds that the indictment is not duplicitous.

"As to the second ground, namely, that this indictment does not charge a crime, the Court grants the motion to dismiss, believing that there has been a failure to set forth sufficient facts.

"In doing this, I am not holding that the Sherman Act would not under any circumstances be applicable to a case involving a cooperative. I recognize and subscribe—as I must—to the determination in the Borden case, which holds that cooperatives are not exempt from the Sherman Act. I merely hold that the indictment in this case does not set forth sufficient facts to constitute a conspiracy in violation of Section 3 of the Sherman Act, in the view that I take of that Act and other Acts referred to in argument and judicial precedents presented.

"Mr. Winn: Exception. That there are not adequate facts pleaded to make an offense.

"Mr. Seal: That goes to all the defendants?

"The Court: Yes, sir.

"(Thereupon, the instant hearing was concluded.)"

The order of the trial court entered on the motions to dismiss reads as follows:

"IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

Criminal No. 294-48

Filed April 27, 1948. Harry M. Hull, Clerk

UNITED STATES

vs.

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC., et al., Defendants

Order Dismissing Indictment

"Upon consideration of the motions of the defendants, Simpson Brothers, Inc., and B. B. Derrick, respectively, to dismiss the indictment in the above entitled cause,

"It is this 27th day of April, A. D. 1948,

"Ordered, That the motion of Simpson Brothers, Inc. to dismiss the indictment be and the same is hereby granted, and,

"It Is Further Ordered, That the motion of the defendant B. B. Derrick to dismiss the indictment be and the same is hereby granted and

"It Is Further Ordered, That upon consideration of the Court's motion, the indictment in the above-entitled cause be and the same is hereby dismissed as to all remaining defendants.

By the Court.

(S.) R. B. KEECH,
Associate Justice."

Full opportunity was afforded all parties to present their views in the court below. After three full days of argument, the trial judge rendered his opinion and entered his

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order. The official transcript has been designated as a part of the appeal record and is incorporated herein by reference.[1]

The trial judge had before him the indictment which also has been designated as part of this record on appeal. He based his opinion on the indictment itself and not on the summary of the indictment which the United States has submitted as part of its appeal. The sufficiency of the indictment itself was the principal issue raised by the motions to dismiss and is the principal issue here.

Reasons to Dismiss

The record is clear that the opinion of the trial judge dismissing the indictment was based solely on the ground that the indictment was faulty as charged in the motions to dismiss. It was not predicated on the construction of a statute or statutes. Therefore, in accordance with the Criminal Appeals Act and the decisions of the courts, the Supreme Court of the United States has no jurisdiction over the instant appeal. 18 U. S. C. A. 682; *United States* v. *Borden Co.*, 308 U. S. 188; *United States* v. *Wayne Pump Co.*, 317 U. S. 200; *United States* v. *Swift & Co.*, 318 U. S. 442.

The statement by the United States that the *Borden* case is on all fours with the instant case is misleading as presented. The Supreme Court in its opinion in the *Borden* case said:

> "The established principles governing our review are these: (1) Appeal does not lie from a judgment

[1] Although urgently requested from the date of the trial judge's ruling on the motions to dismiss, the official transcript was not delivered to counsel for appellee herein until June 1, 1948. The errors in said transcript are numerous, beginning with the failure to note the appearances of Elisha Hanson and Letitia Armistead on behalf of appellee herein. Time was not available to correct the record and to file opposition to the notice of appeal within the time allowed by the Rules. The record is clear, however, in support of the views outlined in the opposition to appeal.

which rests on the mere deficiencies of the indictment as a pleading, as distinguished from a construction of the statute which underlies the indictment. (2) Nor will an appeal lie in a case where the District Court has considered the construction of the statute but has also rested its decision upon the independent ground of a defect in pleading which is not subject to our examination. In that case we cannot disturb the judgment and the question of construction becomes abstract. (3) This Court must accept the construction given to the indictment by the District Court as that is a matter we are not authorized to review."[2] (308 U. S. at page 193.)

There is no reasonable manner in which the clear cut opinion of the trial judge can be considered in any other light than that of section (1) of the above quotation. Even if it be so, it cannot be viewed in a light beyond that of section (2) of the above quotation. Unless the principles long established are now rejected, this Court must hold that it has no jurisdiction over the present appeal.

It should also be pointed out that in the *Borden* case the trial judge wrote a lengthy opinion in respect of the statutes. He felt this necessary in that case because of the complexity of the factual situation presented. A study of the indictment in the *Borden* case will show that the United States went to great lengths to implicate city officials and unions as well as a producers cooperative and distributing dairies. There were numerous averments of coercion, duress, physical violence and other elements lending an air of criminality to the entire situation. There were no such averments in the indictment in the instant case. The arguments below were clear in that the parties alleged to have conspired here were merely conducting normal contractual relationships which tended to react to the benefit of the cooperative.

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[2] Principles numbered (4) and (5) in the same paragraph of the opinion are not quoted, as they are inapplicable to the instant case.

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In the *Borden* case the Court had to interpret statutes to take the cooperative and the labor unions out from under the Sherman Act. In the instant case no such interpretation was necessary, for the indictment itself did not plead facts sufficient to constitute an offense against the United States under the Sherman Act. That and no more was the holding of the trial judge.

There is no doubt but what the United States would have properly filed its appeal to this Court if the question involved was a dismissal based solely upon the invalidity or construction of a statute or statutes. This Court has clearly so held in *United States* v. *Hastings*, 296 U. S. 188, and likewise in the *Borden* case.

Just as clearly, however, this Court has held that it does not have jurisdiction in a case such as the one before it now. In *United States* v. *Wayne Pump Company*, 317 U. S. 200, this Court stated at pages 207-208:

> "In the light of the opinion, however, we conclude that the judgment upholding the demurrer was based also on grounds independent of the construction of the statute involved. The demurrers upon which the ruling below was based show on their face, as appears from the typical example below, that they were aimed not at the coverage of the Sherman Act but at the form of the indictment. This was the objection determined by the court. The excerpts from the opinion quoted above are conclusive, we think, that the District Court rested its ruling on the insufficiency of the pleading as an independent ground.
>
> "*Since the judgment below was not placed solely upon the invalidity or construction of the statute but had an additional and independent ground, the Criminal Appeals Act does not authorize review.*" (Emphasis supplied)

This statement was based on the finding of the trial court judge, which is found at pages 205-206 of the same case and stated in part as follows:

> "The charges are much too general. They do not adequately describe the nature of the alleged unlawful conspiracy agreements or arrangements which defendants are accused of having made, nor show how the defendants became parties thereto, nor how they collaborated in doing the unlawful things; nor set out any unlawful means whereby the unlawful objectives were accomplished."

Likewise, in *United States* v. *Swift & Company*, 318 U. S. 442, this Court adhered to its views expressed in the cases above cited.

In view of the foregoing, it is clear that this Court must reject the appeal of the United States in the instant case because it has no jurisdiction to entertain said appeal under the Criminal Appeals Act. The law is now so well settled on the facts presented that there obviously can be no substantial question for the Court to consider. No statutory interpretation such as the United States has tried to read into the trial judge's opinion was before the Court below. In the absence of some such interpretation there clearly can be no reason to confuse the issues here by attempting to inject into the case the results of confused thinking regarding the effect of the Capper-Volstead Act, the Agricultural Adjustment Act, and the Clayton Act as they might or might not apply to the Sherman Act when no such question arose in the court below.

Conclusion

Therefore, it is submitted that this honorable Court has no jurisdiction under the Criminal Appeals Act to entertain this appeal and that there is no substantial question in-

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volving the interpretation of Federal statutes, and the appeal should be dismissed.

Respectfully submitted,

ELISHA HANSON,
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Attorneys for the Appellee, Safeway Stores, Incorporated.

June 4, 1948.